

DRAFTING ARBITRATION CLAUSES

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Checklist to consider in drafting business related ADR clauses:

- Broad versus Narrow Clause?

“Any controversy or claim **arising out of or relating to this contract**, or the breach thereof, shall be settled by arbitration administered by the _____ Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.”

- Should all disputes be arbitrable?
 - What, if anything, should be excluded?
 - Injunctive/Provisional relief?
 - Who decides arbitrability issues?
 - Will court action be necessary to “clarify” scope of what is arbitrable?
- Will the clause be self-enforcing?
 - Is it merely an “Agreement to Agree?”
 - Waiver of non-self-enforcing clause?
- Will the clause clearly state what arbitral rules will apply?
 - Are all those rules appropriate for “your” dispute?
 - Should the rules be tailored?
 - Waiver of specified arbitral rules?
- How/who will decide the number and composition of the arbitration panel?
 - Pro/Cons of using/providing a “named” arbitrator in the clause—
sunset/unavailability provision?
 - Do “you” only want 1 arbitrator?
 - Subject matter expertise important?
 - Due-Diligence on arbitrator selection?
 - Party-Appointed Arbitrators?
 - ✓ Role of AAA/ABA Code of Ethics—incorporate into contract?
- Any “significant” procedural issues that should/not be addressed in clause?
 - Class Actions
 - Discovery permitted and, if so, permitted scope?
 - Who can/should sign/issue subpoenas?

- Where will the arbitration take place—venue?
 - Will the specified venue control?
 - Will/should the arbitral association make a binding decision on locale?
 - Will enforceability of venue be an issue?
 - Will any State statute “control” venue question notwithstanding contract provision providing for venue?
 - ✓ Role of Federal Arbitration Act (FAA)?
- Fees, Costs, Attorney Fees Recovered?
 - See Leamon v. Krajciwicz, (F038025, Calif. Ct. of Appeals, Fifth District, filed 2/24/2003), compliance with contractual pre-arbitration provision, i.e. mediation, required in order to obtain attorney fees?
- Choice of law for contract verses choice of law for arbitration provision
- Should/does the clause “require” the arbitrator to “follow the law?”
 - “Manifest Disregard of the Law” standard?
 - Grounds for appeal in contract?
- Other drafting concerns.
 - Bar punitive damages?
 - Prohibit joinder of parties?
 - Reasoned award required from arbitrator(s)?
- Any clause enforcement issues?
 - Unconscionability—Fairness
 - Applicability of Contract defenses
 - Severability
 - Preemption—FAA?
 - Does the California Judicial Council Arbitration related rules on disclosure, etc. “trump” the FAA? (See “Stock Answer to Ethics Spat,” ABA Journal, March 2003, page 14)
- Specific concerns in drafting that are unique to the nature/business of dispute?
 - Employment/Discrimination
 - Franchise
 - **Baseball Arbitration desired to “ensure” negotiated/mediated solution?**

See American Arbitration Association “Drafting Dispute Resolution Clauses—A Practical Guide.” Also, visit the AAA website at www.adr.org.



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Charles E. Rumbaugh is an attorney practicing in commercial/international/government contract law with an emphasis in the private dispute/negotiation related arena as an educator/trainer, professional speaker, arbitrator/mediator as well as private judge. He is a prolific writer/publisher and speaker on substantive and Negotiation/Dispute Resolution topics and has presented advanced/basic negotiation, mediation, and arbitration skills training seminars/workshops in Latin America, Far East, and throughout the United States.

Previously, Mr. Rumbaugh was Corporate Director of Contracts & Pricing for Lear Astronics Corporation where he was responsible for the contracts, pricing, and business management functions. Earlier he was Assistant to Corporate Vice President, Contracts and legal counsel at a major business unit for Hughes Aircraft Company (Hughes Electronics). Before joining Hughes he was Corporations Counsel for the California Department of Corporations.

Mr. Rumbaugh received his Bachelor of Science degree in engineering from UCLA and was employed as an engineer with Westinghouse Electric Corporation prior to attending California Western School of Law where he received a Juris Doctor degree. He also has an ADR Mediation Certificate from Pepperdine University and Center for Conflict Resolution, an Advanced Management Program Certificate from the USC Graduate School of Business and is currently an adjunct professor at several universities for their commercial/business, contract & procurement, international law and ADR/Negotiation programs. He is an advisor to the California State University Contracts and Procurement Certification Program.

His current/past membership on arbitration and mediation panels includes the Large, Complex Case Panel of the American Arbitration Association and National Association of Securities Dealers as well as the following:

- FAM—Fanchise Arbitration and Mediation Services
- Center for Conflict Resolution panel of Arbitrators/Mediators
- State of California Department of Insurance Qualified Mediator
- State of California Public Works Contract Arbitrator
- ArbitrationWorks, Inc. panel of Arbitrators/Mediators
- EEOC Qualified Mediator
- Los Angeles Superior Court Judge Pro Tem
- Former Federal Administrative Law Judge, EEOC
- Numerous Federal/State Courts and Administrative Boards Arbitrator/Mediator panels

Charles Rumbaugh is Co-Chair of the California State Bar Franchise Law Committee; and Vice-Chair of the California State Bar Business Law Section ADR Committee. He is an active member of the American Bar Association (ABA) as well as vice-Chair of the Strategic Alliances Committee of the ABA Public Contract Law Section and founder of the Public Contracting Committee of the ABA Dispute Resolution Section.

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